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No. 84-1130

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PAUL DEMPSTER and
SAILORS' UNION OF THE PACIFIC,
Petitioners,

v.

PETER TURNER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S MEMORANDUM IN OPPOSITION

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RESPONDENT'S MEMORANDUM IN OPPOSITION

STATEMENT

Respondent Peter Turner has been a member of the petitioner Sailors' Union of the Pacific ("SUP") for more than fifteen years. However, a provision in the SUP Constitution provided that no member could vote in any union election or referendum until the member had actually served on board ship under an SUP contract for at least six years. Because of limited employment opportunities in the shipping industry, and because the collective bargaining agreements negotiated by the union grant a hiring preference to members meeting the six year rule, respondent has not yet accumulated sufficient "sea time" to acquire the right to vote on any of the many questions

which vitally affect his working conditions. Nevertheless, he is required to support the union under a union security clause and is fully subject to union discipline under the SUP Constitution.

Although respondent was willing to pay dues and accept the obligations of a union member, he believed that he could not be denied the right to vote within the union. Accordingly, he filed this action pursuant to section 101(a)(1) of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a)(1), against petitioner SUP and its president, petitioner Paul Dempster, to challenge the validity of the six-year sea-time rule. His complaint sought both to prevent the union from denying the right to vote to "permit members," as those members lacking six years of sea time are called, and to invalidate a referendum from which the permit members had been excluded and in which the union had adopted several constitutional amendments, including a 67% increase in the dues rate established by the constitution. In addition, his complaint sought an order requiring the union to refund to all members the increased dues that had been collected pursuant to the unlawful referendum.

On cross-motions for summary judgment in the district court, petitioners argued that the court lacked jurisdiction to consider a challenge to the validity of a union rule governing the right to vote, because such challenges could only be pursued by the Secretary of Labor. They also argued that, assuming the court did have jurisdiction, certain of their voting restrictions were in fact reasonable.

The district court ruled for respondent. It first concluded that it had jurisdiction under 29 U.S.C. § 412 to consider challenges to the reasonableness of union rules limiting the right to vote in union referenda. Pet. App. A13-18. Despite what the district court deemed to be its obligation to give deference to internal union rules in

order to avoid undue interference in union affairs, Pet. App. A18-19, it found that the SUP's voting restriction was unreasonable because it had the effect of excluding "fully one-third of the members . . . from voting on vital issues." Because it also found that there was no justification for such a lengthy disqualification, Pet. App. A22, it held that the rule violated section 101(a)(1) and enjoined its enforcement. Pet. App. A7. Because the rule was unlawful, the district court also set aside the referendum which had been conducted pursuant to the rule, and ordered the union to remit the improper dues increase to each of its members. Pet. App. A7-8. At respondent's suggestion, the district court also ordered the union to print the order in its newspaper, so that all union members would be aware that their rights had been vindicated. Pet. App. A8. The Court of Appeals for the Ninth Circuit affirmed in a brief opinion, which is reported at 739 F.2d 1426.

REASONS FOR DENYING THE WRIT

The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court or of Any Other Court of Appeals, and Petitioners Have Failed to Preserve Their Third Question Presented for Review in This Court.

1. Petitioners first seek review because, they contend, this Court's decision in *Calhoon v. Harvey*, 379 U.S. 134 (1964), denies the district court any jurisdiction to determine the validity of union rules governing the eligibility to vote in union referenda. The Court of Appeals squarely rejected this argument, and no other court of appeals has accepted it. In fact, there is no inconsistency with *Calhoon* and the decision below is plainly correct, principally because *Calhoon* involved only challenges to procedures for electing union officers; this case, by contrast, addresses voting in union referenda and meetings.

In *Calhoon*, members of a union sued under section 101(a)(1) of the LMRDA to invalidate two union rules:

(1) a rule that only members who have belonged to the union for at least five years were eligible to run for union office, and (2) a rule that each member could nominate only himself for union office. The Court determined that the first rule limited the right to run for union office, but that rules governing eligibility for office were governed solely by Title IV of the LMRDA. Because such rules may only be challenged by the Secretary of Labor under section 402, a union member cannot seek to litigate them under section 101(a)(1). The Court also concluded that the second rule did not deny the "equal right to nominate," which is protected by section 101(a)(1), because the rule gave each member the same right to nominate. Although, as the Court noted, the two rules taken together did prevent members who failed to satisfy the candidate eligibility rules from nominating anybody, members could not use that conjunction to evade the requirements of sections 402 and 403, which provide that members whose ultimate complaint is about a union's candidate eligibility qualifications may obtain redress only in an action filed by the Secretary of Labor.

Petitioners' argument here ignores the fundamental distinction between this case and *Calhoon*—the *Calhoon* plaintiffs challenged a union officer election, which is regulated by Title IV of the LMRDA. *Accord, Teamsters Local 82 v. Crowley*, —— U.S. —— (1984). Here, by contrast, respondent challenged a union referendum on constitutional amendments, including dues, which not only is not regulated by Title IV (which governs only those elections involving the selection of union officers), but is regulated solely by Title I. If petitioners' argument were correct, members like Turner would not merely be relegated to the procedures prescribed by Title IV for challenging elections, but would be deprived of any remedy whatsoever to challenge even the most extreme denials of the right to vote, so long as the union constitution (on which, of course, the members could not vote) so pro-

vided. Congress plainly did not intend that result. *E.g.*, *Denov v. Musicians Local 10-208*, 703 F.2d 1034, 1037 (7th Cir. 1983).

Petitioners argue, however, that the six-year sea-time rule was not "discriminatory" and that therefore *Calhoon* precludes respondent's challenge. Pet. at 8-9. Although inartfully phrased, this defense appears to be merely a repetition of petitioners' argument below that union members may only challenge a union denial of the right to vote by asserting that the union has applied its voter eligibility rules in a "discriminatory" manner—*i.e.*, in a manner other than that required by the union's rules—and that a member may never challenge a voter eligibility rule on its face, no matter how many members are excluded by the rule and how unreasonable the exclusion.

Insofar as petitioners rely on *Calhoon*, they confuse this Court's discussion of candidate eligibility rules with the voter eligibility rules at issue in this case. Indeed, petitioners' argument would render nugatory the proviso of section 101(a)(1), which grants "equal rights . . . to vote in elections or referendums . . . *subject to reasonable rules* and regulations in such organization's constitution." *Calhoon* stands for no such proposition, and although the various decisions cited at page 8 of the petition do follow *Calhoon* in forbidding Title I challenges to the reasonableness of rules governing eligibility to run for office, no reported decision adopts the argument that rules governing the eligibility to vote on dues referenda and similar matters are insulated from review for reasonableness.

2. Petitioners next seek review of the portion of the orders below that invalidated the dues increase. They do not argue that the exclusion of the one-third of the union membership who did not meet the six year sea time requirement was reasonable. Rather, they contend that because the SUP's dues increase would have been approved "by majority vote of the members" as required by section 101(a)(3) of the LMRDA, even if the permit members

had been allowed to vote, the increase cannot be set aside. The flaw in this argument is that the courts below did not rely on section 101(a)(3) to invalidate the dues increase; their decisions rest on the unlawful denial of voting rights under section 101(a)(1) and the standards for approval of a dues increase in the SUP's own constitution, and it is clear that a union dues referendum, like any other referendum, must comply with both of them. *Bunz v. Moving Picture Mach. Operators*, 567 F.2d 1117, 1120 (D.C. Cir. 1977); *Rota v. BRAC*, 64 F.R.D. 699, 702-703 (N.D. Ill. 1974). *See also Denov v. Musicians*, *supra*, 703 F.2d at 1039.

Under the SUP Constitution, a two-thirds majority is required to approve a dues increase, and as petitioners concede, Pet. at 4, if all permit members had been permitted to vote on the dues increase and had opposed the increase, the vote in favor would have been less than 60% in favor. Accordingly, the courts below properly set aside the dues increase, and petitioners could not carry the burden of proof enunciated by this Court for applying the "may have affected" rule of 29 U.S.C. § 482(c)(2), *Wirtz v. Hotel Employees Local 6*, 391 U.S. 492, 505-509 (1968), even if their argument for applying those standards to this case were correct.

Obviously, if the SUP's supermajority provision were contrary to the LMRDA, it could not be applied to bar a dues increase; but petitioners have cited no decision, and respondent is aware of no such decision, that so states. To the contrary, although section 101(a)(3) creates a minimum standard for the imposition of a dues increase, nothing in the LMRDA forbids a union to adopt a constitutional provision that requires a supermajority for passage of an increase. *See Wingate v. Teamsters Local 107*, 59 LRRM 2073 (D. Del. 1964) (in case cited by petitioners, court applied provision in union constitution requiring supermajority to defeat proposed contract). Because the SUP has chosen to adopt such a provision, it is by that standard that its referendum must be judged.

3. Petitioners' final argument for granting review is that the district court's failure to certify this case as a class action prevented the court from requiring them to refund the unlawfully collected dues to their members. Although respondent's complaint sought unionwide relief, it did not seek to proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure.[1] Yet petitioners did not complain about Turner's failure to proceed as a class action in *any* brief on the merits in either the district court or the court of appeals, even in the petitions for reconsideration or rehearing that were filed in each court. Only after rehearing was denied in the court of appeals did petitioners even hint at such an argument in a motion for stay pending certiorari, which was denied without opinion. This case thus arises in a fundamentally different posture than *Landry v. Sabine Indep. Seaman's Ass'n*, 623 F.2d 347 (5th Cir. 1980), where a similar objection was presented in a timely manner.

Had petitioners raised their class certification argument in the district court, respondent would have had the option of either meeting that contention on the merits, or seeking to amend his complaint and obtain class certification. Because petitioners chose instead to take their chances on the merits, they have deprived the Court of an airing of the arguments in the opinions of the lower courts. Accordingly, petitioners cannot obtain review on this issue. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975).[2]

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[1] Unionwide relief is frequently granted in Title I cases without any class certification, *e.g.*, *Pawlak v. Greenawalt*, 628 F.2d 826 (3d Cir. 1980); *see also Hall v. Cole*, 412 U.S. 1, 8 (1973) (by their very nature, Title I actions vindicate the collective interest of all union members in their democratic rights).

[2] We do not dispute that, as suggested by the cases cited at page 14 of the Petition, union members who lacked notice of the action could have mounted a collateral attack on the judgment had it

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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been adverse to their interests. This opportunity is not, however, available to petitioners who were parties to the action from the start and in any event are adversaries of the remaining members of the "class" whose due process rights were at stake in the cited cases. In this regard, we note that not only has each union member received written notice of the district court's actions in the union's newspaper, but petitioners have frequently discussed developments in the case in that newspaper in the course of denouncing respondent.